88-814

No. 88-_____

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WAYNE DOUGLAS SMITH,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

1. Whether a trespass by a paid informant which is instigated by a police request for information, encouraged by the promise of payment for that information, and rewarded by a substantial cash payment, constitutes a "search" within the meaning of the Fourth Amendment.

2. Whether the illegal actions of a paid police informant must fall within the scope of a formal agency relationship as defined by the common law of torts, in order to implicate the Fourth Amendment.

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THE STATE OF WASHINGTON,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner Wayne Douglas Smith prays that a writ of certiorari issue to review the judgment of the Supreme Court of Washington, dated June 9, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported at 110 Wn.2d 658 (1988), and is set forth as Appendix A to this Petition. A facsimile of that Court's Order denying rehearing is attached as Appendix B to this Petition.

The Findings of Fact and Conclusions of Law of the trial court are unpublished, and are set out at Appendix C.

JURISDICTION

Rehearing was denied by the Supreme Court of Washington on September 14, 1988. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides, in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...

STATEMENT OF THE CASE

Petitioner Wayne Smith was convicted of possession of marijuana and the use of drug paraphernalia in the Superior Court of Mason County, Washington. The convictions were based on evidence obtained in a search under a warrant which was issued upon the basis of information obtained from a paid police informant. With three Justices dissenting, the Supreme Court of Washington affirmed the convictions, and the trial court's order denying the defense motion to suppress that evidence.

1. The Searches. On January 5, 1984, Washington State Patrol Detective Donald Morrison received a telephone call from one James Michael Morris. Morris said he wanted to be paid for information on marijuana growing in the Shelton, Washington, area. Det. Morrison had never met or heard of Morris. They arranged to meet the next day.

In their first meeting, Morris told Det. Morrison he had been a drug user, had a prior arrest for drugs,[1] and had previously been paid for information by some other police agency. Then Morris showed Det. Morrison two houses near Shelton--one on the River Road, the other at 40 Wood Lane--where he said marijuana was being grown. Morris said that Wayne Smith was involved in this growing of marijuana--and that he, Morris, had at one point been involved as well. At the close of this first meeting, Det. Morrison paid Morris $20.[2]

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[1]In fact, as he later admitted, Morris was a drug addict, had a prior conviction for drugs, was going through a divorce, and was deeply in debt.

[2]The money paid Morris on January 6 was designated, in Washington State Patrol accounts admitted into evidence below, as being "for information." However, Det. Morrison testified it was "actually for expenses." He did not say what those expenses were.

During the next few days, Det. Morrison checked on Morris' background by calling Sgt. Dean Byrd in the Mason County Sheriff's Office. Sgt. Byrd told Morrison that "he knew Mike Morris. He didn't know if Mike had called, but there were no cases open at that time."

Morris and Det. Morrison met several times over the next few weeks, and generally "kept in touch". They spoke by telephone at least ten times during this period. Morris was given an assigned number, and shown the State Patrol pay schedule. According to Det. Morrison, it was "customary" for Morris to call collect to Det. Morrison's office, and it was "prearranged, that he could call, and it was accepted." Det. Morrison testified Morris never failed to appear for a meeting when called, and never disregarded any instructions he was given.

Several matters were discussed during these initial meetings. Morris testified he was told that to make a search warrant, there had to be probable cause developed "within 72 hours" prior to the application. Morris also said he was told this:

> The procedures were that he [Morrison] cannot tell me to do something, and that if I had gone on the property with him telling me to do it, it would be trespassing.

Det. Morrison confirmed this. Appendix A-10. So did his partner, Det. Paul Peterson, who described the directions Morris was given as follows:

> [W]e all made that point well understood, that we could not ask him to go on the property, and that if he did go on the property it would have to be a legitimate excuse, or reason, or something. We couldn't ask him to go on that property.

In addition, Det. Morrison testified "there was an understanding that if there was nothing found, there would be no pay."

On January 10, Morris was paid another $20. Again, the official records showed this was for "information," but Det. Morrison testified it was "actually for expenses." On January 13, Morris was paid $200--according to Det. Morrison, "for information, for expenses, to cover the whole thing, everything." On January 16, Morris and Det. Morrison made an unrelated purchase of a small quantity of cocaine--and Morris was paid $25 "for expenses."

On January 24, 1984, Det. Morrison obtained a warrant to search the River Road property from Mason County Superior Court Judge Hewitt Henry. In the affidavit for that warrant, Det. Morrison related the information he had obtained from Morris, to whom he referred to as "I-NS 84-012.[3]

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[3]Det. Morrison testified he did not expect Morris' name would remain confidential, but it was his "regular practice" to use code names for "confidential informants" in warrant affidavits, whether or not he intended to keep the informant's name identity secret.

The warrant was executed that same day. No growing marijuana and no grow lights were found. The only contraband discovered were two small leaves that tested positive for marijuana. However, Det. Morrison believed that one of the outbuildings contained "a growing room," where he said he recognized a "strong odor of marijuana."

Later that day, Det. Morrison went to the property at 40 Wood Lane. There he saw a pickup truck being unloaded, but he could not see who was unloading it or what was being unloaded. He took that information to Mason County Prosecutor Gary Burleson, who told him there was not probable cause for a search warrant for 40 Wood Lane.

The next morning, January 26, Det. Morrison called Michael Morris. Det. Morrision testified that Morris "was waiting for a call on our success, and I

called him and told him that we were not successful." In that call, Det. Morrison also told Morris that the Prosecutor had turned down the search warrant for the property at 40 Wood Lane. Det. Morrison testified he knew Morris would understand that meant he was not going to get paid. Det. Morrison also knew that Morris had previously said "he could go to the property at 40 Wood Lane and check his work, because he had done a roof there sometime before."[4]

That night, Morris went to the property at 40 Wood Lane. No one was home. In the dark, Morris crawled up on the roof, looked through a skylight, and observed marijuana plants in an upstairs bedroom.

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[4]Det. Morrison testified he could not recall whether, in the phone conversation on January 26, Morris had said he would go out to 40 Wood Lane--although he had told a defense investigator Morris had said that. However, Det. Morrison testified he was sure he "didn't tell him to go on that property" because if he did Morris would be "deemed working for" him.

Morris testified he did this under the guise of repairing the flashing on the skylight, pursuant to a "verbal warranty that I put on all my roofs."[5] However, on cross-examination he admitted that he "went out to get solid info," because he knew he "wasn't going to get paid unless there was solid evidence."

The next morning, Morris called Det. Morrison--again, collect--and told him that he had been to the Wood Lane property and could confirm that the marijuana was still growing there. Det. Morrison incorporated this information in an affidavit for a search warrant for 40 Wood Lane--again, referring to Morris as "INS 84-012".

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[5]Morris thus contradicted Det. Morrison's testimony that the ostensible purpose of the visit was to "check his work." He also admitted he had completed work on the roof over four months before, he done no other followup, was asked to do none, and was not paid for this visit. An examination of the skylight at the time of the suppression hearing revealed no sign of any "repair."

Judge Henry issued a search warrant on this application, which was executed the same day. The search under this warrant produced marijuana plants and other evidence against Petitioner Wayne Smith.

After the warrant was returned, Morris was paid another $500 by for the information he provided leading up to this search.

2. The Proceedings Below. Petitioner Wayne Smith was charged with possession of marijuana with intent to manufacture and possession of drug paraphernalia, as a result of the evidence seized in the search. He moved to suppress the evidence seized under the search warrant, on the grounds, inter alia, that Morris' trespass at 40 Wood Lane violated his rights under the Fourth Amendment. After an evidentiary hearing on his motion to suppress, where the above facts were adduced, the trial court denied the suppression motions.

The trial court's order denying suppression concluded that Morris was "not acting as an agent of Detective Morrison; nor was he acting under Detective Morrison's direction or control." Appendix C-15.[6] However, it did not set forth any legal definition of "agency," and made no finding whether Morris' actions had been instigated or encouraged by Det. Morrison's phone call or the promise of payment.

Preserving his objections to that order, Petitioner stipulated that there would be sufficient evidence to convict if the case went to trial. The trial court entered a judgment of guilty on that stipulation, and Petitioner appealed. The

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[6]The trial court's order listed this and several other legal conclusions as "Findings of Fact." See App. C-2. It separately (and sometimes contradictorily) listed several "Disputed Facts" regarding Morris' instructions and purpose in going to 40 Wood Lane, but did not resolve them. App. C-17. The appeal below included challenges to a number of these "Findings" as insufficiently supported by the evidence; the state supreme court did not address those challenges.

Washington Supreme Court affirmed. Its majority opinion held Morris' actions did not implicate the Fourth Amendment, because he "was not acting under or subject to the control of the police." Appendix A-13. The majority cited state common-law agency cases for this proposition:

> For agency to exist there must be a manifestation of consent by the principal (the police) that the agent (the informant) acts for the police and under their control and consent by the informant that he or she will conduct themselves subject to police control.

Ibid. Three dissenting Justices argued to the contrary

> 'Direction and control' are not the only tests of agency in these cases. It is sufficient to establish agency that the police officers 'instigated or encouraged' the conduct in question.

Appendix A-17. They concluded the case should be remanded, because the trial court had made no finding on these issues. Ibid.

A timely Petition for Rehearing was denied by unpublished Order. Appendix B.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

In both the state trial and appellate courts, Petitioner argued that the use of evidence derived from James Morris' nighttime trespass at 40 Wood Lane contravened the Fourth Amendment of the Constitution of the United States, citing both the Fourth Amendment itself and a number of federal authorities in support of that proposition.

The trial court cited no law in its Findings and Conclusions denying the suppression motion. Appendix C. The state Supreme Court included in its discussion of this issue citations and quotations from Fourth Amendment cases from this Court and other federal courts, although it did not refer explicitly to the Fourth Amendment by name. Appendix A-13.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED HERE TO CLARIFY THE APPLICATION OF THE FOURTH AMENDMENT TO THE POLICE-INSTIGATED ACTIONS OF PAID GOVERNMENT INFORMANTS.

This case presents an opportunity for the Court to clarify an important, and unsettled, area of Fourth Amendment law: the circumstances in which the actions of a paid government informant become subject to the restrictions of the Constitution.

The holding of the court below that informants' actions are insulated from constitutional scrutiny so long as they are outside "the control of the police" makes the Constitution's protections turn on the common law of agency. Appendix A-13. That conclusion, which is inconsistent with that of most lower courts which have considered this question, would permit state officials to circumvent the Fourth Amendment by through "independent contractors" who could engage in and be paid for illegal searches with impunity.

This is a dangerous precedent, in an area of growing constitutional importance--due to the increasingly widespread practice of states (like Washington) establishing unregulated "drug enforcement funds" from which police agencies can contract for such lawless "services", as the police did here. It calls for this Court's review.

1. This Court long ago settled the law that purely private action does not implicate the Fourth Amendment. Burdeau v. McDowell, 256 U.S. 465 (1921). Since Burdeau it has seldom been confronted with the officially-instigated actions of private individuals. Perhaps its closest approach came in Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971), where the plurality opinion said it was unpersuaded that Mr. Coolidge's wife was "acting as an 'instrument' or agent of the police when she produced her husband's belongings." It acknowledged, however, that test could be

met not only by police actions which "coerce or dominate," but also "by the more subtle techniques of suggestion that are available to officials in circumstances like these." 403 U.S. 489. The Court since reiterated the holding of Coolidge in this regard, e.g. Walter v. United States, 447 U.S. 649, 656 (1980); but it has not had occasion to refine it.

2. In related areas, this Court has recognized state action implicating Fourth Amendment guarantees, even where there is nothing like a common law agency relation. For example, the Court has included among the "state actors" whose actions may trigger civil rights laws persons who have "acted together with or ha[ve] obtained significant aid from state officials, or because his conduct is otherwise chargable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

3. There appears to be no reason the substantive definition of "state action" subject to the restrictions of the Fourth and Fourteenth Amendments should be narrower in the context of criminal prosecutions. It is now clear, however, that enforcement of the Fourth Amendment in criminal cases necessarily brings into the analysis a second component: the scope and purpose of the exclusionary rule. United States v. Leon, 468 U.S. 897 (1984); cf. Elkins v. United States, 364 U.S. 206, 213-14 (1960). Those considerations would not appear to support the narrow rule adopted by the court below. The efficacy of the exclusionary rule in deterring unlawful conduct depends on forseeability, not control. United States v. Leon, 468 U.S. at 919-921. If it is forseeable that the police encouragement will result in the unconstitutional acquisition of evidence, the exclusion of that evidence can have a

deterrent impact, and fulfill the purpose of the rule.

4. Most lower courts have applied an analysis consistent with these principles, in determining whether the actions of a private person cooperating with police implicate the Fourth Amendment. The test most commonly set forth focuses on the extent of official knowledge of and acquiescence in the intrusive conduct, and the intent of the person conducting the search. See United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981)[7]. In keeping with this approach, most courts have found

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[7]Accord, United States v. Lambert, 771 F.2d 83, 89 (6th Cir.), cert. denied 474 U.S. 1034 (1985); United States v. Black, 767 F.2d 1334, 1339 (9th Cir.), cert. denied 474 U.S. 1022 (1985); United States v. Ford, 765 F.2d 1088, 1090 (11th Cir. 1985); United States v. Howard, 752 F.2d 220, 227 (6th Cir.), cert. denied 472 U.S. 1029 (1985); State v. Boynton, 574 P.2d 1330, 1335 (Haw. 1978); State v. Crawford, 716 P.2d 1349, 1352 (Id. App. 1986); State v. Watts, 750 P.2d 1219, 1221-22 (Utah 1988); United States v. Stein, 322 F.Supp. 346 (N.D. Ill. 1971); Tucker v. Superior Court, 148 Cal.Rptr. 167 (1978).

the Fourth Amendment clearly implicated by the actions of informants recruited and paid by police to engage in the challenged actions. See United States v. Cella, 568 F.2d 1226, 1282 (9th Cir. 1977); United States v. Luciow, 516 F.2d 298 (8th Cir. 1975); Gundlach v. Janing, 401 F.Supp. 1089, 1092 (D. Neb. 1975); State v. Boynton, 574 P.2d 1330, 1335 (Haw. 1978); Annotation, Private Searches, 36 ALR 3d 553, 597.

5. A few courts have adopted approaches similar to that of the majority of the state court below. The Tenth Circuit appears to hold the issue governed by the common law of agency. United States v. Smith, 810 F.2d 996, 998 (10th Cir. 1987). One Sixth Circuit decision seems to limit governmental responsibility to the actions of agents who are directly subject to police "control." United States v. Coleman, 628 F.2d 691, 694 (6th Cir.

1980) (dictum). However, neither these cases nor any other Petitioner has found have gone so far as to exempt from scrutiny the actions of an informant which are directly responsive to a police call for information, and encouraged beforehand by the promise, and ratified afterward by the fact, of monetary reward.

6. The decision below sets an anomolous and dangerous precedent, which encourages police to instigate, but not control, intrusions by private individuals on the rights of others.[8] Its inconsistency with decisions elsewhere, and the diversity among the lower courts generally in this area, are sufficient to warrant this Court's attention.

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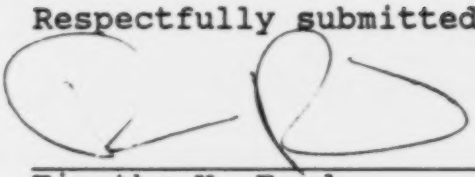
[8]It is worth noting here that Washington law permits police agencies to maintain special "reward funds for the purpose of rewarding informants"-- funded by the proceeds of forfeiture actions in drug cases, and exempt from the usual bugetary processes. RCW 69.50.505 (f)(2)(i).

CONCLUSION

The petition should be granted.

Respectfully submitted,



Timothy K. Ford
Attorney for Petitioner

Seattle, Washington
November 14, 1988.

APPENDIX A

[No. 54083-7. En Banc. June 9, 1988.]

THE STATE OF WASHINGTON, *Respondent*, v. WAYNE DOUGLAS SMITH, *Appellant*.

[1] **Searches and Seizures — Warrant — Affidavit — Sufficiency — Determination.** In deciding whether probable cause to search exists, a magistrate reads an affidavit in support of a search warrant realistically and in a commonsense manner, draws reasonable inferences from the facts set forth in the affidavit, and resolves doubts in favor of issuing the warrant.

[2] **Searches and Seizures — Warrant — Informant — Credibility — Accurate Information.** A statement in an affidavit supporting a search warrant that an informant had previously provided accurate information that allowed the police to observe a third party's criminal activity is sufficient to establish the informant's credibility, even if no information provided by the informant had ever resulted in an arrest or conviction.

[3] **Searches and Seizures — Private Search — Agent of Police — Test.** A private person conducting a search does not act as an agent of the State unless the State consented to the agency relationship and in some way instigated, encouraged, counseled, directed or controlled the person's actions.

[4] **Evidence — Weight — Credibility of Witnesses — Review.** Credibility determinations are for the trier of fact, and its conclusions will be upheld on review if they are supported by substantial evidence.

UTTER, J., PEARSON, C.J., and BRACHTENBACH, J., dissent by separate opinion.

Nature of Action: Prosecution for possession of a controlled substance and unlawful use of drug paraphernalia.

Superior Court: The Superior Court for Mason County, No. 84-1-00015-5, Carol A. Fuller, J., entered a judgment on a plea of guilty on December 26, 1984.

Supreme Court: Holding that an informant who had provided information to the police was reliable, that he had not acted as a police agent, and that his observations were sufficient by themselves to support a finding of probable cause, the court *affirms* the judgment.

Timothy K. Ford, for appellant.

Gary P. Burleson, Prosecuting Attorney, for respondent.

CALLOW, J.—The defendant, Wayne Douglas Smith, appeals his convictions for possession of a controlled substance and unlawful use of drug paraphernalia. Smith pleaded guilty to the charges after the trial court denied his motion to suppress evidence uncovered during two searches of his property. He appeals the denial of his motion to suppress. We conclude that the affidavit for the issuance of a warrant for the search of the Wood Lane property contained a sufficient recitation of facts to establish probable cause independently of information in the affidavit which may have been illegally obtained. A search warrant that is issued based upon an affidavit reflecting adequate legally garnered information to sustain a finding of probable cause is valid even though other information set forth in the affidavit has been illegally acquired. *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987); *State v. Cord*, 103 Wn.2d 361, 693 P.2d 81 (1985); *State v. Cockrell*, 102 Wn.2d 561, 689 P.2d 32 (1984).

I

Smith's arrest resulted from information provided by a police informant. On January 5, 1984, the informant called Detective Morrison of the Washington State Patrol offering to provide information on narcotics trafficking in Mason County. Detective Morrison had never met the informant and knew nothing about him at the time of this telephone conversation. On January 6, 1984, Detective Morrison met with the informant. At the meeting the informant gave the detective information about marijuana growing at Route 5, Box 575-A (the River Road property) and 40 Wood Lane (the Wood Lane property), in Shelton, Washington. The informant told Detective Morrison that Smith was involved in growing marijuana at these locations. At the end of this meeting the detective paid the informant $20.

Detective Morrison checked on the informant's background by calling the Mason County Sheriff's office which had referred the informant to the Washington State Patrol. Morrison learned that no cases had been opened by the sheriff's office with information provided by the informant. Additionally, the detective confirmed that the informant was not currently wanted by any police agency.

On January 7, 1984, Detective Morrison asked Mason County Public Utility Districts 1 and 3 for information on the power usage at the River Road and Wood Lane properties. He did not obtain a search warrant before making these requests. Detective Morrison subsequently received a report from Don Young of PUD 1 stating that the power usage at the River Road property had dropped several months before. Detective Morrison suggested to Mr. Young that an illegal power splice was in place at the River Road property, and Mr. Young went to the property to investigate. Mr. Young was unable to discover the splice, so he called Detective Morrison to ask if the detective would accompany him out to River Road to locate the power splice.

On January 25, 1984, Mr. Young and Detective Morrison went to the River Road property. They entered the curtilage area between the house and the outbuildings and removed the power meter that served the River Road property. Detective Morrison then pressed his ear against one of the outbuildings and detected a hum that continued after the power meter had been removed. Detective Morrison reported this to Mr. Young who stated that the humming indicated an illegal splice. Additionally, while on the River Road property, Detective Morrison noticed a strong odor of marijuana coming from a stovepipe at the rear of a shed.

Later that day, Detective Morrison filed an affidavit for a search warrant for the River Road property. The affidavit included the information from the informant, the evidence of the drop in power usage, and Detective Morrison's observations made during his trip to the River Road property with Mr. Young.

Detective Morrison subsequently obtained a search warrant for the River Road property, which he executed on January 25. Smith was not present when the warrant was executed. A search of the property revealed what officers believed to be a "grow" room in one of the outbuildings, but the only evidence obtained was two marijuana leaves.

While he was at the River Road property neighbors told Detective Morrison that approximately 15 minutes before the officers arrived Smith had driven away in a heavily loaded pickup truck. Detective Morrison then went to the Wood Lane property, where he observed a pickup truck being unloaded by a person he was unable to identify.

Detective Morrison attempted to obtain a search warrant for the Wood Lane property based on his observations. However, the Mason County prosecutor refused to apply for a warrant based on that information. The next morning, Detective Morrison called the informant and told him that no contraband had been seized in the search of the River Road property and that he had been unable to obtain a warrant for the Wood Lane property.

In earlier conversations, the informant had suggested to Detective Morrison that he, the informant, could go onto the Wood Lane property to check some roofing he had done for Smith several months earlier. Detective Morrison did not ask the informant to go onto the property, and told the informant that he could not go there without a legitimate reason and could not trespass.

Later that night, the informant went to the Wood Lane property. While on the roof, he looked through the skylight of the residence and observed marijuana plants growing. On January 27, the informant called Detective Morrison to tell him what he had seen the night before. On the basis of this information and the information obtained during the River Road search, Detective Morrison applied for a search warrant for the Wood Lane property.

Detective Morrison obtained and executed the warrant for the Wood Lane property on January 27. A search of the premises produced several marijuana plants, lights, and

books on marijuana cultivation. Smith subsequently was charged and convicted of possession of a controlled substance and unlawful use of drug paraphernalia.

II

Smith contends that the evidence seized during the search of the Wood Lane property should have been suppressed because that search was based on an invalid warrant. The warrant was issued pursuant to Detective Morrison's affidavit. The affidavit set forth the observations made by the informant on January 26 when he went to the Wood Lane property, the informant's past history of informing, and the results of Detective Morrison's trip to the River Road property.

Smith challenges the warrant affidavit on several grounds. He asserts that the informant's observations cannot be used as a basis for finding probable cause because the information set forth in the affidavit was not sufficient to show that the informant was reliable. Additionally, Smith contends that the informant's observations must be stricken because he was an agent of the police, and therefore his January 26 visit to the Wood Lane property constituted an illegal search. Finally, Smith argues that Detective Morrison's trip to the River Road property with Don Young constituted an illegal search, and thus the evidence discovered at River Road should be stricken from the Wood Lane affidavit. We conclude that the informant was reliable, not a police agent, and that his observations alone were sufficient to support a finding of probable cause. Therefore, we need not address the legality of the River Road search.

In determining whether information provided by an informant establishes probable cause to issue a search warrant, Washington applies the 2-part test set forth in *Spinelli v. United States*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969) and *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964). Under the *Aguilar-Spinelli*

test, the reliability of an informant is established by showing

> underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; [basis of knowledge prong] and . . . underlying circumstances from which the officer concluded that the informant was credible or his information reliable [veracity prong].

State v. Jackson, 102 Wn.2d 432, 435, 688 P.2d 136 (1984).

[1] *Jackson* stated that the *basis of knowledge* prong can be satisfied by showing that the informant "personally has seen the facts asserted and is passing on firsthand information." *Jackson*, at 437. Here the Wood Lane affidavit states that "confidential reliable informant . . . observed the marijuana plants in December 1983 and was on the property on January 26, 1984 and informed your affiant that the marijuana plants and Hal-lide lights are still present and that the plants are still under cultivation." This statement shows that the informant had firsthand knowledge of the marijuana growing at 40 Wood Lane, and satisfies the *basis of knowledge* prong of the *Aguilar-Spinelli* test. A fair reading of the quoted section of the affidavit shows that the informant, while on the property on January 26, 1984, saw marijuana plants under cultivation. Any other interpretation is quixotic at best.

State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975), recognized that "the magistrate is to operate in a commonsense and realistic fashion. He is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth." Further, *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743, *cert. denied*, 457 U.S. 1137 (1982), reaffirmed that "[a]ffidavits for search warrants must be tested in a commonsense manner rather than hypertechnically as long as the basic *Aguilar/Spinelli* requirements are met." Reading this affidavit in a commonsense manner, it cannot be said that the informant did not personally view the growing marijuana on January 26,

1984. *State v. Wolken*, 103 Wn.2d 823, 827, 700 P.2d 319 (1985). Doubts are to be resolved in favor of the warrant. *Fisher*, at 964.

[2] In addition to the basis of knowledge requirement, an informant must also show his *veracity*. This requirement is met if the informant has previously provided information leading to arrests or convictions. *Fisher*, at 965. However, an informant's credibility may still be confirmed even if the information provided has not led to actual arrests or convictions. In *Fisher*, the defendants were convicted of possession of a controlled substance after a search of their residence pursuant to a warrant. The warrant was based on an affidavit which included the following:

> That within the past 72 hours a reliable informant, known to the affiant, has visited the above residence and while there observed LSD and marijuana.
>
> The informant is reliable in that he/she has given information regarding the drug trafficing [*sic*] and use in the past which has proven to be true and correct.
>
> The informant has made two controlled buys to wit: the informant was searched, given money, observed to enter and return from a residence with controlled substances purchased from within.
>
> The informant stated that persons who live at and visit the residence are known to conceal drugs on their persons and in their vehicles. The informant further stated that the residents [*sic*] Tom Lancaster, major sources of income were the sale of drugs and stolen property.

Fisher, at 964. In determining whether the affidavit satisfied probable cause requirements the court noted:

> To meet the *Aguilar/Spinelli* test the credibility of the informant must be demonstrated. The mere statement that an informant is credible is not sufficient, whereas it is almost universally held to be sufficient if information has been given which has led to arrests and convictions.
>
> This case lies somewhere between these two positions. Affiant stated that the informant had given him information proven to be true and correct in the past. While this is more than drawing the conclusion that the informant is credible and admittedly less than stating the

> facts as to why the past information has proven to be "true and correct", it still is a factual statement—not a conclusion of the affiant. We hold in this case that it is enough to enable a neutral magistrate to determine if the informant is credible.

(Citations omitted.) *Fisher*, at 965.

In this case, the affidavit for the Wood Lane warrant included the following information relating to the informant's reliability:

> 2. Confidential reliable informant has in the past furnished to the Shelton Police Department at which he was paid for the information. No cases have been opened at this time.
>
> 3. Confidential reliable informant at the present is working with the Washington State Patrols Narcotics Section introducing agents into known drug traffickers and furnishing information on other Marijuana cultivation.
>
> Confidential reliable informant has in the past week introduced your affiant to a cocaine dealer at which confidential reliable informant and your affiant purchased one-quarter ounce of cocaine and negotiated for the purchase of up to an ounce of cocaine from the same person.
>
> Information received from other sources corroborates all of the information confidential reliable informant has furnished to your affiant.

The information set forth in the Wood Lane affidavit regarding the informant's reliability is similar to, and may be looked upon as even stronger evidence of credibility than, that set forth in the *Fisher* affidavit. Although the informant had not provided information leading to arrests or convictions, the affidavit included sufficient factual statements by which a neutral magistrate could determine that the informant was reliable. The reliability requirements of *Aguilar-Spinelli* were satisfied.

III

Smith also contends that the Wood Lane search warrant was not supported by probable cause because it was based on information uncovered during an illegal search of the

premises by the informant. Smith asserts that the informant was an agent of the police when he looked through the skylight at 40 Wood Lane on January 26. Smith argues that the information uncovered during that search cannot be used to support a finding of probable cause because the informant was a police agent and the search was made without a warrant.

The exclusionary rule does not apply to the acts of private individuals. *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985). Thus even if the informant acted illegally when he climbed upon the defendant's roof, the evidence he discovered while there need not be excluded unless the informant was acting as a government agent.

[3, 4] In order to prove that a private individual was acting as a government agent, "[i]t must be shown that the State in some way 'instigated, encouraged, counseled, directed, or controlled' the conduct of the private person." *Wolken*, at 830. The Wolken test had its origins in *State v. Agee*, 15 Wn. App. 709, 713-14, 552 P.2d 1084 (1976), *aff'd*, 89 Wn.2d 416, 573 P.2d 355 (1977). *Agee* stated that "mere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterrent action [is] insufficient to turn the private search into a governmental one." *Agee*, at 714 (citing *Lustig v. United States*, 338 U.S. 74, 79, 93 L. Ed. 1819, 69 S. Ct. 1372 (1948)).

In this case, the trial court found that the informant had suggested to Detective Morrison that he, the informant, could go onto the Wood Lane property to check the roofing he had previously done there. The court also found that Detective Morrison told the informant more than once that he could not go onto the Wood Lane property without a legitimate reason and that the informant should not trespass. During the omnibus hearing, Detective Morrison testified as follows in response to questions about his relationship with the informant.

Q. Did you direct him in any way?
A. Not—to the best of my knowledge no

Q. Did you ever direct him to go onto anybody's property?
A. No.
Q. Did you ever encourage him to go onto anybody's property?
A. No.
Q. Did you ever pay him to go onto anybody's property?
A. No.
Q. Did you ever direct him to go onto the property of the defendant, Wayne Smith?
A. No.
Q. Did you ever encourage him to go onto the property of Wayne Smith?
A. No.
Q. Did you ever pay him for going onto the property of Wayne Smith?
A. No.

Again during the trial, Detective Morrison testified concerning his conversation with the informant on January 27, 1984, as follows:

Q. You did know that he had a right to go onto the property?
A. He had told me earlier in our conversation that he had stated that he had roofed the house, and that the owner had told him that he could go on the property and check for leaks, or anything to be repaired at a later date. That is what I knew.
Q. But you still didn't tell him to go on that property?
A. I did not tell him to go to that property.
Q. Yet you knew he had a legitimate reason to go on the property and fix the leak?
A. Yes.
Q. If I understand your answer to a direct question, it was because of the fear of legal problems?
A. I wouldn't direct him to go on that property, because it would be trespassing if I told him. He would be working for me.
Q. And you didn't want him working for you?
A. I didn't tell him to go on that property.
Q. So there was—would it be safe to say there was a specific reason that you would not have told him to go on that property?
A. Yes.

Q. And that was because he would be working for you, or deemed working for you; is that right?
A. That's true.

The trial court made findings of fact regarding the informant's relationship with the police. These findings must be upheld if they are supported by substantial evidence. *Goodman v. Darden, Doman & Stafford Assocs.*, 100 Wn.2d 476, 483, 670 P.2d 648 (1983). Among the findings of fact made by the trial court were the following:

12. In the affidavit for search warrant for the 40 Wood Lane property, there were sufficient grounds for the issuing magistrate to find probable cause to issue the warrant, apart from the information of the previous warrant.

. . .

30. The PUD possessed a permission form which stated on its face that the PUD has the right to go onto a power user's property to investigate possible power theft.
31. PUD 1 had completed such a permission form applying to the Route 5 property.

. . .

49. When the warrant affidavit for the Route 5 property was made, the information therein was corroborated by independent sources, including information gained by aerial and ground observation and by Detective Morrison's observation, and by Detective Morrison's discoveries on the property, plus the successful drug transaction set up by [the informant].
50. The warrant affidavit stated that [the informant] had introduced Morrison to known drug traffickers.
51. The statement in the affidavit about drug traffickers was correct, substantiated by the fact that a drug transaction had been set up by [the informant] and completed by Detective Morrison.

. . .

62. The following morning, January 26, 1984, Detective Morrison called [the informant] and told him that no contraband had been seized in the search, and that he had been unable to obtain a search warrant for 40 Wood Lane.
63. In previous conversations with Detective Morrison, [the informant] had suggested he could go onto the property at 40 Wood Lane.

64. Detectives Morrison and Peterson told [the informant on more than one occasion that he could not go on the property at 40 Wood Lane without a legitimate reason, and that he could not go on as a trespasser.

65. [The informant] went on the 40 Wood Lane property, looked through the skylight of the residence there, and observed the interior of the residence.

66. [The informant] had a key to the 40 Wood Lane residence on January 25, 26, and 27, 1984, and used the key to shower and clean up there; further, on those dates [the informant] had permission to use the key.

67. [The informant] had performed work on the skylight at the 40 Wood Lane residence in August or September of 1983.

68. On January 26 or 27, 1984, [the informant] entered the property at 40 Wood Lane and actually observed the halide lights, the marijuana plants, and the contraband referred to in the affidavit for search warrant for 40 Wood Lane. [The informant] made his observation through a skylight.

69. The following morning [the informant] reported to Detective Morrison that he could personally confirm that there were marijuana plants on the 40 Wood Lane premises; that statement was incorporated into a second affidavit, also an exhibit in this case.

70. The Judge who signed the search warrant for 40 Wood Lane was given no information beyond the affidavit.

71. The Judge was not told [the informant's] name and was not provided with extensive information about his background, but was told that he was a reliable confidential informant who had proven reliable in the past.

. . .

73. There was sufficient information in the affidavit for the Court to infer that [the informant] had personally observed the marijuana plants.

74. In the affidavit process for 40 Wood Lane, the Judge was again told that [the informant] had previously provided to the police information for which he was paid, and that representation to the Judge was the truth.

We find no need to remand the cause to the trial court for additional findings. These findings that have been made support the trial court's conclusion that the informant was

not a police agent at the time he searched the Wood Lane property. The testimony and the findings establish that the informant was not acting under or subject to the control of the police. For agency to exist there must be a manifestation of consent by the principal (the police) that the agent (the informant) acts for the police and under their control and consent by the informant that he or she will conduct themselves subject to police control. *See Turnbull v. Shelton*, 47 Wn.2d 70, 72, 286 P.2d 676 (1955); *Poutre v. Saunders*, 19 Wn.2d 561, 565, 143 P.2d 554 (1943).

The evaluation of the evidence and credibility is for the trial court absent an abuse of discretion. *State v. Wolken*, *supra*. Here the record reflects a conscientious effort by the detective to gather information of illegal activities while abiding by the legal restraints placed upon law enforcement officers which protect the privacy of citizens. It is a narrow line to walk at times. Appellate courts should not disturb trial court findings based upon substantial evidence and which hold that the testimony of the police was credible. In the world of secrecy in which drug trafficking is conducted, informants are essential if law enforcement is to be effective at all. To require informers to be volunteers innocent of prior contact with suspect activity or who have not sought out information for law enforcement either on their own initiative or because law enforcement has expressed a curiosity about certain criminal activity, is to set forth a naive and fanciful rule. *Wolken*, at 830, states that it must be shown "that the State in some way 'instigated, encouraged, counseled, directed, or controlled' the conduct of the private person" citing *State v. Mannhalt*, 33 Wn. App. 696, 702, 658 P.2d 15, *review denied*, 100 Wn.2d 1024 (1983).

This statement does not stand for the broad proposition that the authorities cannot work with informers who may be informing to benefit themselves and not out of patriotic fervor. When the genesis of the *Wolken* statement is traced backward in time from *Mannhalt* to *State v. Agee*, 15 Wn. App. 709, 714, 552 P.2d 1084 (1976), *aff'd*, 89 Wn.2d 416, 573 P.2d 355 (1977), the true basis for a restriction on the

use of informants is found to be that the State must not have "a private party do for it that which it is forbidden to do itself." Citing *United States v. Mekjian*, 505 F.2d 1320 (5th Cir. 1975), and *United States v. Clegg*, 509 F.2d 605 (5th Cir. 1975). Consideration of the testimony concerning compliance with the *Aguilar–Spinelli* requirements makes it clear that the officer did not have the informer do what the detective could not do. The informer did what he believed he could lawfully do and later told the detective about what he saw. As stated in *Mekjian*, at 1328:

> "The decisive factor in determining the applicability of the *Byars* [*v. United States*, 273 U.S. 28, 71 L. Ed. 520, 47 S. Ct. 248 (1927)] case," making a search a federal one, "is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means." . . .
>
> The decision here, then, finally revolves around the factual situation with regard to government participation and government knowledge that an illegal search was being conducted and that the government would be the beneficiary of such misconduct. . . . The meaning of the statements made with regard to promises to send information depend upon the context in which they were made and the credibility of witnesses. This appraisal was a role most appropriate for the trial judge. We cannot say that his finding of non–governmental involvement on this record was clearly erroneous.

(Footnotes omitted.)

We conclude that the informant was reliable and did not act as an agent of the police. As a result, his observations alone may be used as a basis for finding probable cause for the issuance of the Wood Lane warrant. We need not address whether the other information set forth in the affidavit should have been excluded.

We affirm the convictions.

DOLLIVER, DORE, ANDERSEN, GOODLOE, and DURHAM, JJ., concur.

UTTER, J. (dissenting)—The majority improperly concludes that the informant was reliable and did not act as an agent of the police. Majority opinion, at 662. This conclusion must be based upon the affidavit supplied to obtain the search warrant. The affidavit fails to provide sufficient information to form the basis for an independent opinion as to the reliability of the informant under the 2-part test set forth in *Spinelli v. United States*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964); and *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984). The fruits of the Wood Lane search are therefore inadmissible.

Even if the majority's conclusion that the informant's reliability is established, the trial court's findings of fact are nonetheless insufficient to support the majority's conclusion that the informant was not an agent of the State. For these reasons, this case must be remanded to determine whether the informant acted under the direction, control, instigation and encouragement of law enforcement officials when obtaining information about activities at the Wood Lane property. *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985).

The test in Washington for determining whether information provided by an informant establishes probable cause sufficient to support the issuance of a search warrant is whether the affidavit establishes the reliability of the informant by setting forth facts that establish the informant's basis of knowledge and veracity. *State v. Jackson*, *supra* at 435. The Wood Lane affidavit fails to satisfy the basis of knowledge prong.

"The basis of knowledge prong requires the affidavit to recite the manner in which the informant gathered his information." *State v. Gunwall*, 106 Wn.2d 54, 70-71, 720 P.2d 808 (1986) (citing *State v. Lair*, 95 Wn.2d 706, 709, 630 P.2d 427 (1981); *State v. Smith*, 28 Wn. App. 387, 391, 624 P.2d 191 (1981)). "To satisfy the 'basis of knowledge' prong, the informant must declare that he personally has

seen the facts asserted and is passing on firsthand information." *Jackson*, at 437. *Spinelli v. United States*, 393 U.S. at 425 (White, J., concurring).

The Wood Lane affidavit fails to show how the informant reached the conclusion "that the marijuana plants and Hallide lights are still present and that the plants are still under cultivation." The raw facts upon which the informant based his conclusion, how the informant obtained those facts, and what precisely did he see or hear or smell or touch firsthand must be established. *State v. Smith*, *supra*; *Stanley v. State*, 19 Md. App. 507, 531, 313 A.2d 847 (1974). These are the questions a magistrate must ask when determining whether *Aguilar–Spinelli*'s basis of knowledge prong has been satisfied if he "is to perform his detached function and not serve merely as a rubber stamp for the police." *United States v. Ventresca*, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965).

The affidavit's recitation that "informant . . . observed the marijuana plants in December 1983 and was on the property on January 26, 1984" fails to show the raw facts upon which informant based his conclusion, much less how the informant obtained those facts. Based on the affidavit, which was the only information before the judge who signed the search warrant for 40 Wood Lane, it is pure conjecture to conclude that the informant personally observed marijuana on his January 26 visit to the property. "[A]n informant's assertion that drugs were present in premises where he had recently been does not show he actually saw the drugs." 1 W. LaFave, *Search and Seizure* § 3.3(d), at 662 (2d ed. 1987). One could assume the informant based his conclusions on his sense of smell, an overheard conversation, or ESP. Based upon the information contained in the affidavit, it is impossible for a magistrate to "independently evaluate the reliability of the manner in which the informant acquired his information" as required by Const. art. 1, § 7. *Jackson*, 102 Wn.2d at 435. *See Aguilar*, 378 U.S. at 114; *Spinelli*, 393 U.S. at 413. The basis of

knowledge prong of the *Aguilar–Spinelli* test is not satisfied. Thus, there was insufficient showing of probable cause to justify issuance of a search warrant.

Moreover, I cannot agree with the majority's conclusion that the trial court's findings of fact were sufficient to resolve the issue whether the informant was a government agent when he visited the Wood Lane property on January 26, 1984. "Direction and control" are not the only tests of agency in these cases. It is sufficient to establish agency that the police officers "instigated or encouraged" the conduct in question. *Wolken*, at 830.

The trial court found that the informant had suggested to Detective Morrison that the informant could go onto the Wood Lane property to check the roofing he had previously done there. It also found that Morrison told the informant he could not go onto the Wood Lane property without a legitimate reason and could not trespass. These findings do not address the issue of whether the police encouraged the informant to go on the roof by stating they had been unable to come up with sufficient evidence to obtain a search warrant. To suggest that the informant's reason for going on the roof late at night was to check the roofing stretches credulity. If the police instigated or encouraged this conduct then the search was illegal. There must be specific findings on this issue and I would remand for this purpose.

PEARSON, C.J., and BRACHTENBACH, J., concur with UTTER, J.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

WAYNE DOUGLAS SMITH,

Appellant.

No. 54083-7

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided by majority vote that the appellant's motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 14th day of September, 1988.

/s/ Keith M. Callow
[acting] Chief Justice

110 Wn.2d 658

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 84-1-00015-5
v.	)	
	)	FINDINGS OF FACT AND
WAYND DOUGLAS SMITH,	)	CONCLUSIONS OF LAW
	)	
Defendant.	)	

THIS MATTER having come on for hearing before this Court upon defense motion to suppress evidence obtained under search warrants for property at Route 5, Box 575-A, Shelton, Washington, and at 40 Wood Lane, Shelton, Washington, the State being represented by Mason County Prosecuting Attorney Gary P. Burleson, and the defendant being represented by Timothy K. Ford, the Court having heard testimony and examined exhibits and being apprised of pertinent files and records herein NOW THEREFORE makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In December of 1983, James Morris received $160 from the Mason County Sheriff's office for information which he provided.

2. On January 6, 1984, Detective Donald Morrison met with James Morris, Morris having been referred to Morrison by the Mason County Sheriff's Office.

3. Prior to January 6, 1984, Detective Morrison had never met with Morris and knew nothing about him.

4. The police agency to which Morris had previously given information was incorrectly identified in the affidavit for search warrant as the Shelton Police Department; that agency was actually the Mason County Sheriff's Office.

5. The confusion as to which police agency Morris had supplied with information is not material to this matter.

6. Detective Morrison paid Morris for

information on January 6, 1984.

7. Detective Morrision also paid Morris $20 on January 10, 1984.

8. If subsequent payments were made to Morris, those payments were made to cover his expenses.

9. Detectives Morrison and Peterson had received information about a Valley Center growing operation.

10. Confidential informant Morris gave Detectives Morrison and Peterson information on the alleged growing of marijuana at Route 5, Box 575-A, Shelton, Washington, and at 40 Wood Lane, Shelton, Washington.

11. Morris also reported that defendant Wayne Smith was renting the 40 Wood Lane property and purchasing the Route 5 property.

12. In the affidavit for search warrant for the 40 Wood Lane property there were sufficient grounds for the issuing

magistrate to find probable cause to issue the warrant, apart from the information of the previous warrant.

13. Detective Morrison contacted agents of Mason County Public Utility Districts 1 and 3 regarding information given him by Morris.

14. No information from PUDs 1 and 3 was used to obtain the search warrant for 40 Wood Lane.

15. The person Detective Morrison contacted at PUD 1 was Don Young.

16. Armed with the information given him, Young went to the Route 5 property.

17. The Route 5 property includes a house and several outbuildings.

18. The power meter on the Route 5 property is located in the curtilage between the house and the outbuilding.

19. The Route 5 property is fenced and surrounded by trees.

20. There are "No Trespassing" and "No

Hunting" signs by the driveway to the Route 5 property.

21. The only entrance to the Route 5 property is from the road.

22. On his initial visit to the Route 5 property, Young noted that fan-like noises stopped when he removed the power meter.

22. On his initial visit to the Route 5 property, Young removed the power meter, and when he did so, a noise which sounded like fans running in one of the outbuildings stopped.

23. Young found no evidence of a splice on that initial visit to the Route 5 property.

24. Any splice on the Route 5 property would have been underground and would not have been visible.

25. On that initial visit to the Route 5 property, Young did not have a locator to detect an underground splice.

26. Young reported to Detective Morrison that he was unable to detect any power

theft at the Route 5 property at that time, which was prior to January 25, 1984.

27. The power readings for the Route 5 property were irregular, which may have indicated a splice.

28. PUD 1 does not provide power use information to the general public, but will provide such information to the police where that request is justified.

29. PUD 1 has no specific policy on disclosure of power use information.

30. The PUD possessed a permission form which stated on its face that the PUD has the right to go onto a power user's property to investigate a possible power theft.

31. PUD 1 had completed such a permission form applying to the Route 5 property.

32. Morris indicated to Detective Morrison that an illegal power splice had been made at the Route 5 property.

33. Detective Morrison contacted Young

after he received the report regarding Young's investigation of power use at the Route 5 property.

34. On January 25, 1984, Detective Morrison went to Young's office to discuss the alleged power theft.

35. On January 25, 1984, Young and Detective Morrison went to the Route 5 property to further investigate the alleged power theft.

36. Detective Morrison accompanied Young at Young's request for assistance in locating the illegal splice.

37. On January 25, 1984, Young drove a PUD truck to the Route 5 property.

38. While at the Route 5 property on January 25, 1984, Detective Morrison pressed his ear against one of the outbuildings on the property and detected a hum that continued after the power meter was removed.

39. Detective Morrison reported his

observation of the continuous humming to Young.

40. According to Young, the humming indiated an illegal splice.

41. While on the Route 5 property on January 25, 1984, Detective Morrison detected an odor of marijuana emanating from a stove pipe.

42. Later, on January 25, 1984, Detective Morrison prepared and filed a search warrant affidavit for the Route 5 property, specifically, for the property at Route 5, Box 575-A.

43. The warrant affidavit for the Route 5 property was an exhibit in this case.

44. Other than the affidavit, no additional information was conveyed to the Judge at time of the warrant application.

45. The warrant affidavit did not name Michael Morris, rather referred to him by his official identification number: I-NS-84-012.

46. Detective Morrison did not intend to keep Morris' name secret after the case was opened because Detective Morrison knew that the information exposed in the warrant affidavit would jeopardize the confidentiality of Morris.

47. The warrant affidavit stated that Morris had previously furnished information to the Shelton Police Department.

48. The affidavit was incorrect to the extent that Morris had actually furnished information to the Mason County Sheriff's Office, not the Shelton Police Department.

49. When the warrant affidavit for the Route 5 property was made, the information therein was corroborated by independent sources, including information gained by aerial and ground observation and by Detective Morrison's observation, and by Detective Morrison's discoveries on the property, plus the successful drug transaction set up by Morris.

50. The warrant affidavit stated that Morris had introduced Morrison to known drug traffickers.

51. The statement in the affidavit about drug traffickers was correct, substantiated by the fact that a drug transaction had been set up by Morris and completed by Detective Morrison.

52. The warrant affidavit did not state that Morris was a drug addict with a criminal record, facts which Detective Morrison knew.

53. The warrant on the Route 5 property was served on the same day it was issued.

54. The only evidence returned under the warrant was two marijuana leaves.

55. The officers searching under the warrant found what they believed to be a "grow room" inside one of the outbuildings.

56. On January 25, 1984, Detective Morrison went from the Route 5 property to 40 Wood Lane in Shelton.

57. At approximately 6:15 p.m. on January 25, 1984, Detective Morrison observed at 40 Wood Lane a truck he believed to belong to Wayne Smith, and further observed a person who appeared to be unloading that truck.

58. Detective Morrison could identify neither the person nor the contents of the truck.

59. Immediately after executing the search warrant on the Route 5 property, Detective Morrison learned from neighbors there that Wayne Smith had driven away from the residence in a yellow Datsun pickup truck, approximately 15 minutes prior to the 4:30 arrival of Detective Morrison and law enforcement officers.

60. The neighbors also advised that the pickup truck was heavily loaded and had nearly run a neighbor off the road as it left the area.

61. In his attempt to obtain a search warrant for 40 Wood Lane, Detective

Morrison used the information obtained from the neighbors at the Route 5 property and the two marijuana leaves secured there; however, Mason County Prosecutor Gary Burleson declined to apply for a warrant on that information.

62. The following morning, January 26, 1984, Detectective [sic] Morrison called Morris and told him that no contraband had been seized in the search, and that he had been unable to obtain a search warrant for 40 Wood Lane.

63. In previous conversations with Detective Morrison, Morris had suggested that he could go onto the property at 40 Wood Lane.

64. Detectives Morrison and Peterson told Morris on more than one occasion that he could not go on the property at 40 Wood Lane without a legitimate reason, and that he could not go on as a trespasser.

65. Morris went on the 40 Wood Lane

property, looked through the skylight of the residence there, and observed the interior of the residence.

66. Morris had a key to the 40 Wood Lane residence on January 25, 26, and 27, 1984, and used the key to shower and clean up there; further, on those dates, Morris had permission to use the key.

67. Morris had performed work on the skylight at the 40 Wood Lane residene in August or September of 1983.

68. On January 26 or 27, 1984, Morris entered the property at 40 Wood Lane and actually observe the halide lights, the marijuana plants, and the contraband referred to in the affidavit for search warrant for 40 Wood Lane. Morris made his observation through a skylite.

69. The following morning Morris reported to Detective Morrison that he could personally confirm that there were marijuana plants on the 40 Wood Lane

premises; that statement was incorporated into a second affidavit, also an exhibit in this case.

70. The Judge who signed the search warrant for 40 Wood Lane was given no information beyond the affidavit.

71. The Judge was not told Morris' name and was not provided with extensive information about his background, but was told that he was a reliable confidential informant who had proven reliable in the past.

72. The affidavit did not expressly state that Morris had seen the marijuana plants, although he actually had seen them.

73. There was sufficient information in the affidavit for the Court to infer that Morris had personally observed the marijuana plants.

74. In the affidavit process for 40 Wood Lane, the Judge was again told that Morris had previously provided to the police

information for which he wwas paid, and that representation to the Judge was the truth.

75. The Judge was not told about checks that had been conducted as to power use at 40 Wood Lane, checks which had revealed nothing unusual.

76. The search at 40 Wood Lane produced alleged contraband.

77. Morris was paid for the information he provided as to the premises at Route 5, Box 575-A and 40 Wood Lane.

78. The information provided by Detective Morrision in the affidavit for the search warrant at 40 Wood Lane was truthful and accurate, was corroborated, and did not omit any material fact.

79. When confidential informant Morris went to 40 Wood Lane to do what he termed a repair, he was not an agent of Detective Morrison; nor was he acting under Detective Morrision's direction or control.

DISPUTED FACTS

1. Exactly what previous information Morris had given to the Mason County Sheriff's Office remains disputed.

2. Whether payments were made to Morris on dates other than January 6 and 20, 1984, for information he provided remains disputed.

3. Exactly what information or services Morris was paid for remains disputed.

4. Whether, at the time the affidavit for the Route 5 property was made, information provided by Morris was corroborated by such independent sources as aerial and ground observation, Detective Morrison's observations on the property, and the successful drug transaction which Morris arranged remains disputed.

5. Whether the persons Morris introduced Detective Morrison to were known as drug traffickers from any source other than Morris remains disputed.

6. Whether both Detectives Morrison and Peterson told Morris he could not go onto the Route 5 property without a legitimate reason and that he could not go on as a trespasser remains disputed.

7. Whether Morris actually went onto the property at 40 Wood Lane, climbed on the roof, and looked through the skylight remains disputed.

8. Whether Morris repaired the skylight with mastic is disputed, as is whether <u>at that time</u> he observed the halide lights, the marijuana plants, and the contraband referred to in the affidavit for the search warrant for 40 Wood Lane.

9. Whether all the information given to the Judge by Detective Morrison in the affidavit for the search warrant for 40 Wood Lane was truthful, accurate, and corroborated by Morris, by Detective Peterson, or Detective Morrison reamins [sic] disputed.

CONCLUSIONS OF LAW

1. Confusion as to which police agency Morris had initially supplied with information is not material to the affidavits and warrants in this case.

2. In the affidavit for search warrant for the 40 Wood Lane property, there were sufficient grounds for the issuing magistrate to find probable cause to issue the warrant, apart from the information of the previous warrant.

3. Detective Morrison neither omitted nor misrepresented any material fact to the issuing magistrate.

4. Every statement set forth in the affidavit for 40 Wood Lane was substantially corroborated by fact.

5. Morris was properly characterized to the issuing magistrate as a credible and reliable informant who had previously given information which had proved correct, and who had set up a successful drug

transaction.

6. There were a great many facts set out in the affidavit which could have been used by the magistrate in issuing the warrant for 40 Wood Lane, and the magistrate did not rely on conclusory statement.

DONE IN OPEN COURT this 27 day of December, 1984.

s/ Carol A. Fuller
JUDGE

PRESENTED BY:

s/ Gary P. Burleson
GARY P. BURLESON,
Prosecuting Attorney

COPY RECEIVED:

s/ Timothy K. Ford
TIMOTHY K. FORD
Attorney for Defendant

Supreme Court, U.S.
FILED
DEC 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-814

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WAYNE DOUGLAS SMITH,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

GARY P. BURLESON
PROSECUTING ATTORNEY

MICHAEL E. CLIFT
DEPUTY PROSECUTING ATTORNEY
411 North Fifth
Shelton, Washington 98584
(206)427-9670

ATTORNEY FOR RESPONDENT:
MICHAEL E. CLIFT

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STATEMENT OF THE CASE

On January 27, 1984, The Honorable Hewitt A. Henry, Judge, approved a search warrant for the petitioner's property located at 40 Woodlane, Shelton, Washington. (Appendix A) The warrant was executed the same day. The following items were seized at the petitioner's residence pursuant to the warrant:

274 started marijuana plants, three to eight inches tall;

88 growing marijuana plants, four feet tall and over;

various small containers of marijuana seeds;

10 halogen light bulbs, 1000 watts each;

4 halide reflectors;

3 halide lamp balasts;

2 twelve-foot-long florescent lamp fixtures with twelve-foot bulbs;

various lights, timers, and switches;

large electric fan;

Ohaus triple beam scale;

Ohaus balance scale;

assorted baggies;

mirror and straw;

various books on cultivation of marijuana and hallucinogenic mushrooms;

photos of marijuana plants in various locations other than 40 Wood Lane;

correspondence to the defendant addressed to him at 40 Wood Lane, and opened;

two recorded tapes taken from the answering machine at 40 Wood Lane;

numerous photos (these taken by police) of the evidence, displaying the layout and scope of the growing operation at 40 Wood Lane.

(APPENDIX B)

The warrant was based upon information provided by a confidential reliable informant.

The informant, later identified as James Morris advised Detective Morrison that he had grown marijuana with the petitioner in the past and that the petitioner was currently growing

marijuana at the 40 Wood Lane property and at the river road property located at Rt.5 Box 575-A, Shelton, Washington. A search pursuant to a warrant at the river road property revealed that a marijuana growing operation had in fact been on that property. The remaining physical evidence, including a strong odor of marijuana and two leaves combined with the neighbors reports that the defendant left the premises with a heavily loaded truck earlier in the day corroberated the information provided by Mr. Morris.

Mr. Morris, on his own initiative, went to the 40 Wood Lane property and observed the marijuana plants on January 26, 1984. He had also observed the plants during December 1983.

Mr. Morris had the petitioner's permission to be on the property. Mr. Morris had installed a skylight for the defendant in late August or September 1983 and felt he could inspect it

pursuant to a verbal warranty. Futhermore, Mr. Morris had a key to the 40 Wood Lane residence during January 25-27, 1984 and had used the key to shower and clean up there. Mr. Morris had permission to use the key. (Findings of Fact 66)

Detectives Morrison and Peterson specifically told Mr. Morris on more than one occassion that he could not go on the property at 40 Wood Lane without a legitimate reason, and that he could not go as a trespasser. (Findings of Fact 64)

Procedural Facts

The trial court entered numerous Findings of Fact at the suppression hearing. (Petition For Writ, Appendix C). The court found that the information provided by Mr. Morris was "...truthful,and accurate, was corroborated and did not omit any

material Fact." (Finding of Fact 78).

The court further found that when Mr. Morris went to 40 Wood Lane, he did so on his own to do a repair and was not acting as an agent or under the direction of Detective Morrison. (Finding of Fact 79).

The trial court upheld the search warrant and subsequent search. The Washington State Supreme Court affirmed the judgment at State v. Smith, 110 Wn.2d 658,_____P.2d_____(1988).

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT IT.

1. A Writ of Certiorari will be granted only when there are special and important reasons therefore. Rule 17.1 Furthermore, the Supreme Court will not grant a Writ of Certiorari merely to review evidence or inferences drawn from it. General Talking Pictures Corp. v.

Western Electric Co., (1938) 304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849, adhered to 305 U.S. 124, 83 L.Ed. 81, 59 S.Ct. 116, reh.den. 305 U.S. 675, 83 L.Ed. 437, 59 S.Ct. 355.

The informant, Michael Morris was found to be acting strictly on his own when he entered the petitioner's property at 40 Wood Lane and not at the direction of or as an agent of law enforcement. Mr. Morris had ongoing permission of the petitioner to enter the premises and in fact had been given a key to enter the residence.

The petitioner asks the Court to Find an agency relationship where the trial court has made a Finding that none exists in fact or in law.

Furthermore, the petitioner characterises Mr. Morris' actions as a trespass, however, no such finding was made. Interesting legal arguments were

made and decided in the context of "what if the informant acting as a private individual acted illegally?" Yet, there was no finding that Mr. Morris acted illegally as he had permission from the petitioner to use the premises and even had a key to the residence. This question is not of sufficient magnitude, nor is it based upon facts which warrant review by this Court.

The state court held

> In order to prove that a private individual was acting as a government agent, "[i]t must be shown that the State in some way `instigated, encouraged, counseled, directed, or controlled' the conduct of the private person." Wolken at 830, ... Agee stated that "mere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterent action [is] insufficient to turn the private search into a governmental one.

Agee, at 714 citing Lusting v.

United States, 338 U.S. 74, 79, 93 L.Ed. 1819, 69 S.Ct. 1372 (1948)"

State v. Smith, 110 Wn.2d 658, 666 (1988)

The Washington State Supreme Court's decision is not in conflict with any decision of any federal court of appeals and the law has been settled in this area.

2. The judgment rests on adequate federal and state grounds.

CONCLUSION

The petition should be denied.

Respectfully submitted,

GARY P. BURLESON
PROSECUTING ATTORNEY

MICHAEL E. CLIFT
Deputy Prosecuting
Attorney for the
Respondent.

Shelton, Washington
December 23, 1988

APPENDIX A

WPF CR-02.0400 (1992)

RECEIVED
AND FILED
JAN 27 1984
ELAINE PROVINCE
CLERK OF THE SUPERIOR COURT
MASON COUNTY, WASH
By

MASON COUNTY COURT

BEFORE _____, JUDGE

STATE OF WASHINGTON }
COUNTY OF } ss

AFFIDAVIT FOR SEARCH WARRANT
(CASE NO. SCSA84-3)

The undersigned on oath states:

1. I am Donald L. Morrison, WSP
(name) (Title/Agency)

2. That affiant states:

[X] Evidence of a crime (describe):
See Attached affidavit

JUL 5 1985

[X] Contraband, the fruits of a crime, [illegible]ings otherwise criminally possessed (consisting of):
See attached affidavit

[ ] Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed (describe):

are concealed in Mason County, Washington in, on, or about:

[X] Certain premises (describe):
Residential property located at 40 Woodlane,
Shelton Wa.

[ ] Vehicles (describe):

[ ] Person(s) (description(s)):

3. That affiant's belief is based upon the following facts and circumstances:

See attached

D. L. Wilkinson
Affiant

D. L. WILKINSON
Type or Print Name

Sworn and subscribed on:
Date: Jan. 27, 1984

Notary Public for Washington
Residing at Shoreview

Approved by:

Deputy Prosecuting Attorney

IF ANY ADDITIONAL FACTS ARE RELIED UPON, THEY MUST BE SET FORTH AND SWORN TO ABOVE.

RECEIVED
AND FILED
JAN 27 1984
ELAINE PROVINCE
CLERK OF THE SUPERIOR COURT
MASON COUNTY, WASH.

AFFIDAVIT OF DET. DONALD MORRISON

STATE OF WASHINGTON)
) ss. 84SCSW043
COUNTY OF MASON)

DET. DONALD L. MORRISON, being first duly sworn upon oath, deposes and states:

THAT your affiant is a duly commissioned detective with the Washington State Patrol assigned to the Narcotics Division.

THAT you affiant has probable cause to believe that evidence of a felony, possession of a controlled substance, Marijuana, over 40 grams, is located upon the following described real property:

A 2 story Log Cabin, two sky lights, a new wood deck covering that portion of the residence that faces Wood Lane and East Hill Crest. The dwelling is located on a corner lot, at Wood Lane and East Hill Crest.

Your affiants probable cause is based on the following:

That a confidential reliable informant (I-NS 84-012) contacted your affiant and furnished the following information to your affiant, reference illegal indoor Marijuana cultivation.

1. That the residence, 40 Wood Lane, there is Marijuana plants under cultivation. Confidential reliable informant stated that he/she had observed the marijuana plants in December 1983 and was on the property on January 26, 1984 and informed your affiant that the marijuana plants, and Hal-lide lights are still present and that the plants are still under cultivation. Confidential reliable informant further stated that there are additional lights in operation upstairs at this time. Confidential reliable informant advised your affiant that the residence is owned by Lind Buddrius and rented by Wayne D. Smith. Smith lives at the residence along with a male subject known as Mike.

Confidential reliable informant stated that he/she has known Smith to grow Marijuana steady for the past year. Confidential reliable informant at one time was involved with Smith in growing Marijuana.

2. Confidential reliable informant has in the past furnished to the Shelton Police Department at which he was paid for the information. No cases have been opened at this time.

3. Confidential reliable informant at the present is working with the Washington State Patrols Narcotics Section introducing agents into known drug traffickers and furnishing information on other Marijuana cultivation.

Confidential reliable informant has in the past week introduced your affiant to a cocaine dealer at which confidential reliable informant and your affiant purchased one-quarter ounce of cocaine and negotiated for the purchase of up to an ounce of cocaine from the same person.

Information received from other sources corroborates all of the information confidential reliable informant has furnished to your affiant.

4. Wayne D. Smith - 10-23-51 - lives and rents the house at 40 Wood Lane in the Agate area, Shelton, Washington. Smith owns property at Rt. 5 Box 575A, Shelton, Washington and in 1982 Smith purchased property at 5644 Steamboat Island Road, Olympia, Washington. Confidential reliable informant states that the property in Olympia was purchased to grow Marijuana.

5. On January 25, 1984 your affiant served a search warrant at Rt. 5 Box 575A, Shelton, Washington. This property is owned also by Wayne D. Smith. The search warrant was for Illegal Cultivation of Marijuana. All that was located was a growing room, strong-odor of Marijuana, condensation on the insulated walls and two (2) small leaves of Marijuana on the ground outside of the shed. Your affiant at this time was advised by neighbors that Wayne D. Smith, driving his yellow Datsun Pick-up, had departed the residence approximately fifteen (15) minutes prior to our arrival at approximately 4:30 p.m. Your affiant was advised that the Pick-up was heavily loaded and almost ran the neighbor off of the road exiting the area.

Your affiant at approximately 6:15 p.m., January 25, 1984, located Wayne Smith's yellow Datsun pick-up at 40 Wood Lane, Shelton, Washington. The pick-up appeared to be approximately one-quarter full and was being unloaded by a male subject. Your affiant at that time was unable to identify the items being unloaded.

Further affiant sayeth naught.

Donald Morrison
DET. DONALD MORRISON

SUBSCRIBED AND SWORN to before me this 27th day of January, 1984.

Diana K. Olson
NOTARY PUBLIC in and for the State of Washington, residing at Shelton

WPF CR-02.0410 (8/

RECEIVED AND FILED
JAN 27 1984
ELAINE PROVOL
CLERK OF THE SUPERIOR C.
MASON COUNTY, WASH.
By _____

MASON COUNTY _____ COURT

BEFORE _____, JUDGE

SEARCH WARRANT
(CASE NO. SC5a84-3)

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

1. Upon the sworn affidavit of Donald J. Morrison made before me, it appears that there is probable cause to believe that:

[ ] Evidence of a crime, or

[X] Contraband, the fruits of crime, or things otherwise criminally possessed, or

[ ] Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed

are under the control or in the possession of some person(s) and are concealed in or on certain premises, vehicles or persons within Mason County, Washington hereinafter described.

2. YOU ARE COMMANDED to:

[X] Search said premises, vehicles or persons specifically described as follows:

40 Woodlane, Shelton Wa.

[X] Seize the following property specifically described as follows: Any and all suspected marijuana and/or any equipment or paraphinalia used to cultivate or process marijuana together with evidence of ownership.

3. Safely keep the property seized.

4. Return this warrant to the undersigned judge within 5 days following issuance. The return must include an inventory of all property seized.

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession a copy and receipt shall be conspicuously posted at the place where the property is found.

Dated: 1/27/89

Judge

As authorized by the above judge pursuant to CrR 2.3 (telephone search warrant).

Name

Type or Print Name

Title

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 27th day of Jan 19 89

Elaine Province

County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of Mason.

By Deputy

APPENDIX B

WPF CR-02.0420 ('82)

RECEIVED
AND FILED
JAN 30 1984
ELAINE PROVINCE
CLERK OF THE SUPERIOR COURT
MASON COUNTY, WASH.
By _____

Mason County ~~Mason~~ COUNTY Superior COURT

BEFORE HENRY, Superior Court JUDGE

INVENTORY AND RETURN OF SEARCH WARRANT
(CASE NO.)

#1 1. I received a search warrant for the premises, vehicle or person specifically described as follows:
SMITH, WAYNE D. 40 WOOD LN. SHELTON

#2 2. I made a diligent search of the above-described premises, vehicle or person and found and seized the items listed as follows:
SEE REVERSE SIDE

#3 3. Name(s) of person(s) found in possession of property:
NONE

#4 4. The inventory was made in the presence of:

[ ] The person(s) named in (3) from whose possession the property was taken.

[X] DON MORRISON WSP (At least one person other than the undersigned)

#5 5. Name of person served with a copy of warrant and given a receipt for the property taken or description of place where copies posted:
KITCHEN TABLE

#6 6. Place where property is now stored:
SHELTON POLICE DEPT

Dated: 1-27-84

Witnessed by:
John Sussman
Signature

Type or Print Name

D L Morrison WSP
Signature of Peace Officer

D.L. Morrison
Type or Print Name

Detective
Title

INVENTORY AND RETURN OF SEARCH WARRANT (CrR 2.3(d)) INRSW

INVENTORY OF WARRANT RETURN.

3.

#1 132 MARIJUANA STARTED PLANTS 3" TO 8" HIGH
#2 LARGE GARBAGE BAG CONTAINING G.V.M.
#3 EIGHT 1000 WATT HALIGEN BULBS
#4 OHAUS TRIPLE BEAM SCALE WITH WEIGHTS AND (4) TIMERS
#5 HALIDE BALLAST
#6. BALLAST AND TIMER
#7. HID LAMP BALLAST
#8. HID LAMP BALLAST
#9. DAYTON TIMER SWITCH
#10. ONE BEN LEATHER BAG CONTAINING INDICIA, RECORDS, PHOTOS AND PERSONAL PHONE BOOK.
#11. (2) 1000 WATT HALIDE BULBS
#12 (2) 12FT FLORICENT LIGHTS WITH BULBS
#13 ONE GROCERY BAG OF G.V.M
#14 (1) 24 HOUR 110 VOLT TIMER
#15 VARIOUS SMALL CONTAINERS OF MARIJUANA SEEDS
#16 ONE GROCERY BAG OF (2) PLASTIC BAG OF GUM
#17 ASSO BAGGIES, BOX OF PARAPHILIA, PERSONAL USE DISH, MIRROR AND STRAW. BAGGIE WITH G.V.M.
#18. OLDER OHAUS BALANCE SCALE
#19. $2052.00 IN CASH
#20. S&W 9mm MODEL #59 SER# A668285
#21. VARIOUS BOOKS ON MARIJUANA GROWING.
#22. GROWING MARIJUANA 50 PLANTS 4FT + HIGH
#23. GROWING MARIJUANA 38 PLANTS 4 TO 5 FT HIGH
#24. 4 HALIDE REFLECTORS
#25. THREE ELECTRIC BULB HOLDERS
#26. TWO RECORDED TAPES
#27. 142 STARTER PLANTS
#28. ASSORTED RECORDS
#29. HALIDE LIGHTS
#30. FAN (DAYTON)

G. Matt Heil
STRETTON DRUG ENFORCEMENT